

O:TCEQ-Office of the Chief Clerk COMPANY:

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July 17, 2009

Via Federal Express & Facsimile (512) 239-3311Office of the Chief Clerk of the
Texas Commission on Environmental Quality
ATTN: Agenda Docket Clerk
12100 Park 35 Circle, MC-101, Building F
Austin, Texas 78711-3087Re: SOAH DOCKET NO. 582-08-2177
TCEQ Docket No. 2007-1765-MWD

Dear Clerk:

Enclosed please find the original and 8 copies of *Koontz Bayou Old River Group's Reply to TCB Rental's Exceptions and Proposed Corrections to the Proposal for Decision*. Please file the original with the Court and return a file-stamped copy to me in the self-addressed, stamped return envelope enclosed for your convenience.

By copy hereof, all counsel of record are being provided copies of this filing.

Very truly yours,

MUNSCH HARDT KOPF & HARR, P.C.



Amy Rickers

AR/ta

Enclosures

CHIEF CLERKS OFFICE

2009 JUL 17 PM 3:10

TEXAS
COMMISSION
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QUALITY

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*Chief Clerk - TCEQ**July 17, 2009**Page 2***cc: Via Facsimile (512) 474-9888 & first class mail**

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Michael J. O'Malley
Administrative Law Judge
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Austin, TX 78701

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Bridget Bohac
TCEQ Office of Public Assistance MC-108
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*Chief Clerk - TCEQ**July 17, 2009**Page 1***Via Facsimile (512) 239-4015 & first class mail****Kyle Lucas****TCEQ Alternative Dispute Resolution Program MC-222****P.O. Box 13087****Austin, TX 78711-3087**

O:TCEQ-Office of the Chief Clerk COMPANY:

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2009 JUL 17 PM 3:29

SOAH DOCKET NO. 582-08-2177
TCEQ DOCKET NO. 2007-1765-MWD

CHIEF CLERKS OFFICE

IN THE MATTER OF THE APPLICATION	§	BEFORE THE STATE OFFICE
OF TCB RENTAL, INC FOR A NEW	§	
WASTEWATER PERMIT, PROPOSED	§	OF
TEXAS POLLUTANT DISCHARGE	§	
ELIMINATION SYSTEM PERMIT NO.	§	ADMINISTRATIVE HEARINGS
WQ0014725001	§	
	§	

**KOONTZ BAYOU OLD RIVER GROUP'S REPLY TO TCB RENTAL'S EXCEPTIONS
AND PROPOSED CORRECTIONS TO THE PROPOSAL FOR DECISION**

Koontz Bayou Old River Group ("KBOR") respectfully presents its Reply to TCB Rental's Exceptions and Proposed Corrections to the Proposal for Decision and would show as follows:

I. INTRODUCTION

KBOR adopts and incorporates its Briefing and Objections to Proposal for Decision filed on July 6, 2009 as if stated herein and asserts that the lack of support for the ALJ's Findings of Fact and Conclusions of Law render the Proposal for Decision ("PFD") improper and therefore, the PFD should not be adopted by the TCEQ in this matter, rather, the TCEQ should deny TCB's permit. Without waiving the arguments in its Briefing and Objections to Proposal for Decision, KBOR does not object to TCB Rental Inc.'s ("TCB") proposed corrections except to the extent that the corrections affect provisions and statements to which KBOR previously objected. Furthermore, KBOR asserts that TCB's request for the sharing of transcription costs should be denied.

II. ARGUMENT

As noted by TCB, the assessment of transcription costs is governed by 30 TAC § 80.23(d). However, 30 TAC § 80.23(d)(1) requires the timely filing of a request by a party if

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one is to be made. KBOR asserts that the request by TCB is not timely. As noted by the ALJ at footnote 120 of the PFD, TCB "has not asserted that any other party should pay for any of the costs." If such a request were to be made by TCB it should have been made prior to the issuance of the ALJ's determination of costs. A number of factors are set forth in 30 TAC § 80.23(d) for consideration of transcript cost assessment:

(d) Assessment of reporting and transcription costs.

(1) Upon the timely filed motion of a party or upon its own motion, the commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding. The commission shall consider the following factors in assessing reporting and transcription costs:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.

The applicable considerations fall under 30 TAC § 80.23(d)(1)(B), (G).

In relation to 30 TAC § 80.23(d)(1)(B), the financial ability of the parties to pay in this matter is drastically different and weighs in favor of TCB being assessed the transcription costs. While TCB is a viable business organization, KBOR is a citizens group made up of landowners surrounding the property with much fewer financial resources available. These citizens pooled what resources they could afford to cover the expenses of representatives for this litigation. All of KBOR's experts and legal representatives in this matter worked on a pro bono basis with only expenses, not time, being paid for by KBOR, as noted in the Affidavit of Jean Killgore attached hereto as Exhibit A and incorporated herein by reference. These expenses alone, due to the length and complication of discovery requiring travel for depositions and a three-day hearing have been a strain for KBOR.

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When considering 30 TAC § 80.23(d)(1)(G), there are a number of factors that make the allocation of transcript costs to TCB just and reasonable. Not the least of these factors is that TCB Rental is the Applicant for the permit at issue. Whenever an Applicant files for a permit they risk the fact that persons may contest the permit. TCB argues that "KBOR's hearing request is what necessitated the transcript to begin with." TCB p. 3. This argument ignores the fact that KBOR did not request the transcript, rather the ALJ requested the hearing transcript. TCB then states that it "has been forced to spend a great deal of money to litigate this case because of KBOR contentions that have been soundly rejected by the ALJ." TCB p. 3. Again, undertaking the application process subjected TCB to the possibility that persons would comment and contest the application. TCB chose to undertake that process. Furthermore, to argue that exercising a right to contest an application as established by the TCEQ rules and regulations should be premised on the fact that one can fund litigation and transcript costs violates the very tenants of the public participation process. Additionally, while TCB seems to be arguing that KBOR's arguments were without merit, that was not the finding of the ALJ. A finding of non-meritorious or frivolous claims may warrant charging KBOR with transcript costs however, the ALJ did not find KBOR's claims to be frivolous.

III. CONCLUSION

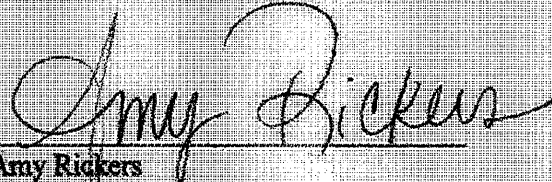
For the above stated reasons, as well as those established in KBOR's Briefing and Objections to Proposal for Decision filed on July 6, 2009, the Findings of Fact and Conclusions of Law set out by the ALJ are not supported by substantial evidence, are contrary to law and should not be adopted. Additionally, TCB's request for the sharing of transcription costs lacks basis, would be unjust and unreasonable, and should not be granted. Therefore, KBOR respectfully requests that the ALJ Proposal for Decision not be adopted and the Permit be denied and TCB's request for sharing of transcription costs be denied.

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Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

By:



Amy Rickers

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ATTORNEY FOR KOONTZ BAYOU
OLD RIVER GROUP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via facsimile and first class mail, return receipt requested, on this 17th day of July, 2009 to the following counsel of record:

Les Trobman
General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle, MC-101, Building F
Austin, Texas 78711-3087

Michael J. O'Malley
Administrative Law Judge
State Office of Administrative Hearings
Austin Office
300 West 15th Street, Suite 502
Austin, TX 78701

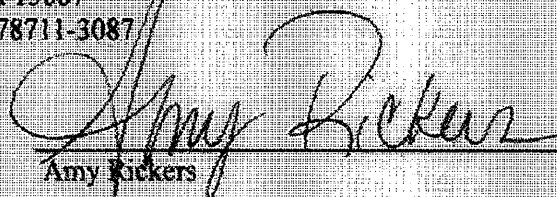
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Amy Rickers

CHIEF CLERKS OFFICE

2009 JUL 17 PM 4:04

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O:TCEQ-Office of the Chief Clerk COMPANY:

SOAH DOCKET NO. 582-08-2177
TCEQ DOCKET NO. 2007-1765-MWD

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE APPLICATION
OF TCB RENTAL, INC FOR A NEW
WASTEWATER PERMIT, PROPOSED
TEXAS POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMIT NO.
WQ0014725001

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

2009 JUL 17 PM 4:04

TEXAS
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AFFIDAVIT OF JEAN KILLGORE

STATE OF TEXAS

§
§
§

COUNTY OF

Burleson

Know all men by these presents, that before me, the undersigned authority, on this day personally appeared JEAN KILLGORE, who upon his oath did depose and state:

1. My name is Jean Killgore. I am over the age of twenty-one (21) years old. I have never been convicted of a crime involving moral turpitude. I have knowledge of each and every fact set forth herein. I am competent to testify about those matters set forth herein.
2. My husband, Leonard Killgore, and I are members of the Koontz Bayou Old River Group ("KBOR").
3. I am the group representative for KBOR in this matter. As KBOR's representative in this matter, I am in charge of handling, monitoring, and paying KBOR's funds for purposes of litigation in this matter.

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4. KBOR members all own or lease property in the area adjacent to and surrounding the proposed water treatment plant site.

5. The interests of KBOR and the primary purpose of the organization is to protect these individuals' land for use as ranching and farming property and this purpose directly coincides with the position of the group and the interests they are attempting to protect in this matter.

6. I have reviewed TCB Rental's *Exception and Proposed Corrections to the Proposal for Decision* ("TCB") and its request for the Commission to assess each party their own transcript costs by assessing 50% of the transcript bill to each party.

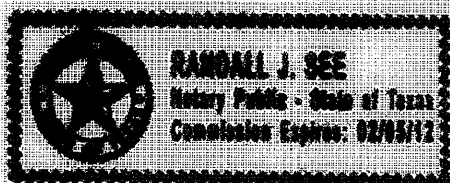
7. TCB states that "[t]here is no evidence TCB is aware of suggesting that KBOR cannot pay the transcript costs and KBOR has funded litigation of this case to this point." TCB p. 3. However, as the person in charge of hiring and paying the experts and attorneys in this matter, I attest that the work done by the experts and attorneys in this matter was done on a pro bono basis for the costs of expenses only. No individual who has assisted KBOR in this litigation has been compensated for their time on the matter.

8. Additionally, as the person managing the funds for KBOR, I attest that KBOR does not have additional resources to pay for transcript costs in this matter.

FURTHER AFFIANT SAYETH NOT.


JEAN KILLGORE

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this 9th day of July, 2009, to certify which witness my hand and seal of office.




Notary Public for the State of ~~Arkansas~~
TEXAS

O:TCEQ-Office of the Chief Clerk COMPANY:

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Date: 7/17/2009 3:04:40 PM**From: Tish Avila****Phone #: 214-880-7651****C/M #: .****Total number of pages (including this cover sheet): 11****Special Message:**

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